

DEC 9 1982

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

REX E. LEE

Solicitor General

LAWRENCE G. WALLACE

Deputy Solicitor General

CARTER G. PHILLIPS

*Assistant to the Solicitor General**Department of Justice**Washington, D.C. 20530**(202) 633-2217*

WILLIAM A. LUBBERS

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

ROBERT E. ALLEN

Associate General Counsel

NORTON J. COME

Deputy Associate General Counsel

LINDA SHER

*Assistant General Counsel**National Labor Relations Board**Washington, D.C. 20570*

QUESTION PRESENTED

Whether the Board properly concluded that an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is not reported. The decision and order of the National Labor Relations Board (App. C, *infra*, 8a-21a) are reported at 256 N.L.R.B. 451.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on July 22, 1982. On October 12, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 19, 1982. On November 9, 1982, Justice O'Connor further extended the time for filing a petition for a writ of certiorari to and including December 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] * * *.

STATEMENT

1. Respondent hauls garbage for the City of Detroit using tractor-trailers that take the garbage from the city to a land fill about 37 miles away (App. A, *infra*, 2a). Respondent employs numerous drivers who operate the trucks. The general policy is to assign each driver to a particular truck, unless that truck is in need of repair (*ibid.*).

James Brown had been employed by respondent as a truck driver since November 3, 1975 (App. C, *infra*, 10a-11a). Brown's routine assignment was to operate a tractor-trailer unit designated truck number 245. On Saturday, May 12, 1979, as Brown was preparing to dump a load of refuse at the landfill, he noticed that Frank Hamilton, another driver for respondent, was having difficulty stopping his truck, which was designated as number 244 (*ibid.*). After Hamilton finally stopped, Brown asked what the trouble was, and Hamilton explained that the brakes were not working (*ibid.*). Brown and Hamilton then returned to re-

spondent's truck repair facility, where Hamilton spoke with mechanic Francis Castelono about truck 244's brake problem. Castelono and mechanic David Ammerman told Hamilton that they would fix it over the weekend or perhaps on Monday morning (*id.* at 2a, 12a).

Early in the morning on Monday, May 14, while transporting a load of refuse, Brown experienced difficulty with one of the wheels on truck 245 and returned it for repair. He reported the problem to mechanic Ammerman. Ammerman told Brown that he would be unable to fix the truck that day because of the backlog of trucks in need of repair and advised Brown to go home or see his supervisor about using another truck (App. C, *infra*, 12a). Brown then reported to his supervisor, Otto Jasmund, who, after checking out Brown's report about truck 245, advised Brown that he should punch out and go home (*id.* at 13a).

Before Brown left the premises, however, Jasmund asked him to remain and drive truck 244 (App. C, *infra*, 13a). Brown declined, explaining that "there's something wrong with that truck" (*ibid.*). Brown further explained that "something was wrong with the brakes * * * there was a grease seal or something leaking causing it to be effecting the brakes" (*ibid.*). Jasmund angrily told Brown to go home, which led to an argument between them.

Supervisor Robert Madary intervened and asked Brown to drive truck 244. Brown again refused, explaining to Madary that the truck "has got problems and I don't want to drive it" (App. C, *infra*, 13a). Madary replied that "half [the trucks around here] 'have problems'" and that if respondent tried to deal with all of them it would be unable to do business (*id.* at 13a-14a). During the conversation, Brown asked, "Bob, what you going to do, put the garbage ahead of the safety of the men?" *Id.* at 14a. Madary did not re-

ply, nor did he or Jasmund make any attempt to show Brown that the truck was safe (*id.* at 20a). Instead, they allowed Brown to go home (*id.* at 15a). Later that day, Brown was discharged (*ibid.*).¹

On May 15, the day after his discharge, Brown filed a written grievance, asserting that he had been improperly ordered to drive truck 244 (App. C, *infra*, 15a). Citing Article XXI, Section 4 of the collective bargaining agreement between respondent and Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, which represented respondent's drivers,² Brown stated that "Truck

¹ John Calandra, the Union's recording secretary, received notice that respondent had discharged Brown and then notified Brown. That afternoon Calandra and Brown went to respondent's facility where they met with supervisors Jasmund and Madary. The supervisors refused to reinstate Brown (App. C, *infra*, 14a-15a).

Respondent's disciplinary form stated that Brown had "violated the following company rule * * * Disobeying of orders (Refusal to drive #244)" (C.A. App. A195), and added that Brown had "voluntarily quit" (App. C, *infra*, 15a). The administrative law judge (ALJ) in this case, however, expressly found that Brown had been discharged (*id.* at 17a). "C.A. App." refers to the appendix filed in the court of appeals. "R. Ex." refers to the exhibits submitted to the ALJ by respondent.

² Article XXI of the Agreement provided, in pertinent part, (App. C, *infra*, 11a; C.A. App. A202-A203):

Section 1.

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Section 4.

The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

#244 was reported by the regular driver as being defective * * * and had not been repaired" (R. Ex. 4). The Union declined to pursue Brown's grievance beyond the initial stages of the grievance procedure (App. C, *infra*, 15a).

2. On September 7, 1979, Brown filed an unfair labor practice charge with the National Labor Relations Board (App. C, *infra*, 15a). Upholding the decision of the administrative law judge (ALJ), the Board concluded that respondent violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Brown (App. C, *infra*, 7a).

The ALJ found that Brown had not voluntarily quit his job, as respondent had contended, but rather, that he was discharged for refusing to operate truck 244 (App. C, *infra*, 17a). The ALJ further held that Brown's refusal was protected by Section 7 of the Act, 29 U.S.C. 157. Based on prior decisions of the Board, the ALJ reasoned that

when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

(App. C, *infra*, 18a, quoting *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975); footnotes omitted). Applying this reasoning to Brown's situation, the ALJ found that Brown was asserting a right clearly provided for in the collective bargaining agreement, and that the assertion was based on an honest belief that the brakes on truck 244 were inadequate (App. C, *infra*,

21a).³ Accordingly, he concluded that respondent violated Section 8(a)(1) by discharging Brown.

In adopting the ALJ's decision, the Board noted that the Court of Appeals for the Sixth Circuit had disagreed with the Board in similar circumstances in *ARO, Inc. v. NLRB*, 596 F.2d 713 (1979), but nonetheless adhered to its position that activity such as Brown's, although performed singly, is "concerted activit[y]" within the meaning of Section 7 of the Act (App. C, *infra*, 7a n.3). The Board ordered Brown reinstated with back pay.

3. The court of appeals denied enforcement of the Board's order (App. A, *infra*, 1a-5a). Adhering to its previous decision in *ARO, Inc. v. NLRB*, *supra*, the court held:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

(App. A, *infra*, 4a, quoting from *ARO, Inc. v. NLRB*, *supra*, 596 F.2d at 718). Applying that test, the court of appeals found that Brown's action in refusing to drive truck 244 was not concerted because "[t]here is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive

³ The ALJ found it immaterial that "another driver subsequently drove truck 244 without incident or that Respondent's record[s] show that truck 244 may have been in good repair * * *" (App. C, *infra*, 19a). "Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the asserted contract claim" but only on whether "the claimed belief [is] 'honestly held'" (App. C, *infra*, 18a-19a).

the truck he believed to be unsafe * * *. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (App. A, *infra*, 4a).⁴

REASONS FOR GRANTING THE PETITION

The question whether an employee's honest and reasonable assertion of a right guaranteed by a collective bargaining agreement is protected by Section 7 is an important and recurring one in the administration of the Act. The decision of the Sixth Circuit that such conduct is not protected concerted activity is squarely in conflict with the decisions of at least two other courts of appeals and may conflict with others. In addition, the decisions of those courts of appeals that have refused to accept the Board's interpretation are based exclusively on an unduly literal reading of the statute without reference to the policies of the Act and without regard to the Board's expertise in interpreting the Act. Those decisions are thus contrary to numerous holdings of this Court requiring deference to the Board's interpretation of the requirements of the National Labor Relations Act.

1. Section 7 of the Act, 29 U.S.C. 157, guarantees to employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Interpreting this language, the Board has long held that an individual's assertion of a right embodied

⁴ The court acknowledged that Brown did make a comment to his supervisor regarding the safety of all of respondent's drivers, but held that this single, isolated statement had not been expressly relied upon by the Board, and, in any event, was not "substantial evidence" of concertedness (Pet. App. A, *infra*, 4a).

in a collective bargaining agreement is concerted activity within the meaning of Section 7, because the individual's efforts "affect the rights of all employees in the unit * * *." *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enf'd, 388 F.2d 495 (2d Cir. 1967). See also *T&T Industries, Inc.*, 235 N.L.R.B. 517 (1978); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Chas. Ind. Co.*, 203 N.L.R.B. 476 (1973); *H.C. Smith Construction Co.*, 174 N.L.R.B. 1173 (1969). As the Board further explained in *ARO, Inc.*, 227 N.L.R.B. 243, 244 (1976), enforcement denied, 596 F.2d 713 (6th Cir. 1979), "[i]ndividual complaints of this sort are similar to grievances, and since they will have an effect on all employees, * * * such conduct is protected by the Act."

The Second Circuit has accepted the Board's interpretation of concerted activity. In *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (1967), the court stated in an alternative holding that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." See also *NLRB v. John Lagenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969).⁵ The Seventh Circuit, in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (1971), expressly adopted the reasoning of the Second Circuit in *Interboro* on this issue. See also *NLRB v. Town & Country*

⁵ In *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (1980), the Second Circuit declined to extend the *Interboro* doctrine to situations where there is no collective bargaining agreement. See *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 303-310 (1981). The court took pains, however, to reaffirm the continuing vitality of the *Interboro* doctrine in that circuit in "situations in which an individual employee is attempting to enforce a collective bargaining agreement which is itself the result of concerted activity" (637 F.2d at 845).

LP Gas Service Co., 687 F.2d 187, 191-192 (7th Cir. 1982); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 29 (7th Cir. 1980); *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (8th Cir. 1970).⁶

The *Interboro* doctrine of concerted activity, however, has hardly received a hospitable reception in all courts of appeals. The Third, Fifth, and Sixth Circuits have directly repudiated the Board's reasoning underlying the *Interboro* doctrine. *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973)⁷ *ARO, Inc. v. NLRB*, 596 F.2d 713, 716-717 (6th Cir. 1979).⁸ Thus, in *ARO, Inc.*, *supra*, the Sixth Circuit, acknowledging the division among the courts of

⁶ In *Roadway Express, Inc. v. NLRB*, 532 F.2d 751 (4th Cir. 1976), the court in a per curiam opinion enforced a Board order based on facts similar to those here (see 217 N.L.R.B. 278 (1975)). But see *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); *Blaw-Knox Foundry & Mill Machinery Inc. v. NLRB*, 646 F.2d 113 (4th Cir. 1981).

⁷ The Fifth Circuit's disapproval of the Board's *Interboro* doctrine in *NLRB v. Buddies Supermarkets, Inc.*, *supra*, was dictum since the court found that the employee's claim was not based on a collective agreement. See *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980), suggesting that *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), supports the Board's theory. Compare *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981).

⁸ In *NLRB v. C&I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (1973), the Ninth Circuit, while expressing no opinion directly on the validity of the *Interboro* doctrine, refused to apply it to a situation where there was no evidence "that the purpose of [the employee's] conduct was for the 'mutual aid and protection' of other employees, or that it was an attempt to enforce the provisions of a mutual bargaining agreement."

The D.C. Circuit also declined to approve application of the Board's *Interboro* decision to a situation where the employee withdrew his grievance and therefore did not attempt to pursue it through the contractually established procedure. *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980).

appeals on this issue, agreed with "the decisions of [those courts] which have rejected the *Interboro* doctrine" (596 F.2d at 717). See also *Kohls v. NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (discussing the split in the circuits). This conflict among the circuits on a recurring issue under the Act that affects the day-to-day activities of employees and employers clearly warrants resolution by this Court.

2. Moreover, the decisions of the courts of appeals, including the decision below, which have rejected the Board's *Interboro* doctrine are based solely on a wooden reading of the statute. Those courts have consistently refused, contrary to numerous decisions of this Court, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978); *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-262 (1975); *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56 (1964); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960), to accord any deference to the Board's consistent interpretation of Section 7 based on the policies of the Act.

Those courts of appeals have seized upon the dictionary definition of the term "concerted" and concluded that protected activity must include in some fashion at least two employees. See *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971). See also *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306 & n.3 (4th Cir. 1980); *Kohls v. NLRB*, 629 F.2d 173, 176 (D.C. Cir. 1980). Exclusive reliance on a dictionary as the basis for interpreting Section 7, however, is questionable at best. First, the aims of the National Labor Relations Act often cannot be effectively accomplished by reading the statute literally. See, e.g., *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964). See generally Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*,

130 U. Pa. L. Rev. 286, 329-331 (1981). Second, Section 7, by its terms, protects any employee engaging in "concerted activity," it is not limited to protecting employees acting in concert and thus its language does not preclude protection for an employee acting alone. Indeed, this Court has acknowledged that Section 7 applies "even though the employee alone may have an immediate stake in the outcome * * *." See *NLRB v. J. Weingarten, Inc.*, *supra*, 420 U.S. at 260. See also *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980); Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980).

Third, the Board's interpretation still requires the existence of concerted activity and thus does no violence to the plain meaning of the statute. The Board has never held that Section 7 protects a purely personal gripe by an individual employee.⁹ It is in no way inconsistent with the statutory language to accord Section 7 protection to efforts by an individual employee to assert rights which, through collective bargaining, have been secured for all the employees in the bargaining unit. If an employee successfully pursues his claim, establishment of the claimed right will benefit all the bargaining unit employees; conversely, if he is unsuccessful, the adverse precedent is likely to diminish the protection under the agreement accorded other employees. Moreover, individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activity which gave rise to the

⁹ See *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 (1962), enforcement denied on other grounds, 310 F.2d 233 (4th Cir. 1962); *Tabernacle Community Hospital & Health Center*, 233 N.L.R.B. 1425, 1429 (1977).

agreement in the first place.¹⁰ As this Court stated in *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962):

The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based * * *.

Indeed, it is the limited construction of Section 7 imposed by the Sixth and other circuits that gives rise to anomalous results under the statute. Under the court of appeals' view, an individual employee's activity is deemed concerted under the Act only when "made on behalf of other employees or at least * * * made with the object of inducing or preparing for group action and hav[ing] some arguable basis in the collective bargaining agreement." *ARO, Inc. v. NLRB*, *supra*, 596 F.2d at 718.¹¹ Thus, if employee Brown had had a helper on

¹⁰ In the Board's view, the employee need not expressly rely on the contract, where the ground for the employee's complaint is a matter clearly covered by the contract. See *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975), *enfd.*, 532 F.2d 751 (4th Cir. 1976). Thus, here, since employee Brown complained about truck safety, a subject specifically governed by the collective agreement, the Company was put on notice that the safety provision of the agreement was implicated—a fact which was confirmed when Brown later filed his grievance specifically referring to Article XXI of the agreement (pages 4–5, *supra*).

¹¹ In *McLean Trucking Co. v. NLRB*, 689 F.2d 605, 609 (6th Cir. 1982), the court, while adhering to its position in this case, explained that, "in evaluating the nature of * * * individual action, * * * the following factors are relevant to the issue of concertedness: (1) the substance of the employee's activity—did he act alone, without union advice or did he seek to involve and

his truck, his refusal to drive the truck for safety reasons would have been concerted. Similarly, even if Brown had been the sole occupant of the truck, his refusal would have been concerted if it could be shown either that he had previously discussed the safety problem with one or more fellow employees or that he was on the verge of doing so.¹² Making the protection of Section 7 turn on these fortuitous circumstances effectuates neither the policies of the Act, nor the legislative purpose in adopting Section 7.¹³

An individual employee who asserts a right negotiated by his bargaining agent is as much in need of statutory protection as a group of employees who are

inform other employees; (2) the degree of union involvement in and concern with the dispute—was a grievance filed, were union officials notified; (3) the subject of the complaint—did it have at least an arguable basis in the collective bargaining agreement or was it merely a personal dispute." Applying these criteria, the court found that the refusal of two employees to drive trucks which they reasonably believed were unsafe was concerted activity protected by Section 7 of the Act, because they had first checked with union representatives and had been advised that, under the collective bargaining agreement, they were not required to drive the trucks without receiving documentation that they had been repaired and were safe to operate (689 F.2d at 610).

¹² See *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011, 1012 (6th Cir. 1981); *NLRB v. Coca-Cola Co.*, 670 F.2d 84 (7th Cir. 1982); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

¹³ The term "concerted" was included in Section 7 to make clear that activities lawfully engaged in by an individual could not be treated "as an illegal conspiracy merely because they are undertaken by many persons acting in concert." *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 258 (1949) (footnote omitted). See also Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 331-346. This purpose obviously indicates nothing about how to deal with individual action covered by the collective bargaining agreement that will necessarily affect other employees.

discharged for the same reason, or as one employee who is discharged while on the verge of soliciting group support. The Board's *Interboro* doctrine thus is a permissible interpretation of the statute and the court of appeals' refusal to uphold it, which conflicts with decisions of the Second and Seventh Circuits, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE

Solicitor General

LAWRENCE G. WALLACE

Deputy Solicitor General

CARTER G. PHILLIPS

Assistant to the Solicitor General

WILLIAM A. LUBBERS

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

ROBERT E. ALLEN

Associate General Counsel

NORTON J. COME

Deputy Associate General Counsel

LINDA SHER

Assistant General Counsel

National Labor Relations Board

DECEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1406

CITY DISPOSAL SYSTEMS, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION for Review and cross-application for
enforcement of an order to
the National Labor Relations Board.

Decided and Filed July 22, 1982

Before: LIVELY and JONES, *Circuit Judges*, and
CECIL, *Senior Circuit Judge*.

PER CURIAM. Petitioner seeks review and the National Labor Relations Board seeks enforcement of an order holding that City Disposal Systems, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act by discharging its former employee, James Brown, in disregard of his Section 7 rights.¹

¹ Section 8(a)(1) provides:

It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the
exercise of the rights guaranteed in section [7].

Section 7 provides in part:

Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. §§ 157 & 158 (1976).

The Board's order relied upon the *Interboro* doctrine,² although it noted that this Circuit has rejected the doctrine. *City Disposal Systems, Inc.*, 256 N.L.R.B. No. 73 (June 9, 1981). We grant the petition for review and deny enforcement.

City Disposal Systems hauls garbage for the City of Detroit from a drop-off point to a land fill some 37 miles away. The garbage is hauled by tractor-trailers. Normally a driver is assigned to a certain tractor-trailer; however, when this vehicle is in for repairs, the driver may be reassigned to another vehicle.

James Brown was a driver for the Company. He normally drove truck number 245. On May 12, 1979, Brown had a near accident with truck number 244 driven by Frank Hamilton when the brakes on 244 would not stop the truck at the land fill. Hamilton took 244 back to the drop-off point. With Brown present, mechanics told Hamilton that the truck would be fixed over the weekend or the first thing Monday morning. Brown's truck, 245, also had a problem with its fifth wheel which was to be fixed by Sunday.

Brown returned to work at 4:00 a.m. Monday, May 14. He took his truck out to the land fill and found that the fifth wheel continued to cause problems. Brown returned to the drop-off point, talked to the mechanics, and learned that his truck could not be fixed that day. He then spoke to a supervisor, Jasmund, who told him to punch out and go home after confirming that his truck would not be fixed. Brown punched out but remained in the driver's room. Jasmund returned and requested Brown to drive number 244. Brown said he would not do so since 244 had a brake problem. Jasmund instructed Brown to go home and the two had words. Another supervisor, Bob Madary, came on the scene. When Brown repeated that 244 had problems,

² See *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd.*, 388 F.2d 495 (2d Cir. 1967).

Madary pointed out that all the trucks had problems and if the Company dealt with them all it would be unable to move the garbage. Brown testified that he replied, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Madary was unmoved. Brown left work. Later he was notified that the Company had listed him as a voluntary quit.

Subsequently Brown, a member of Local 247, International Brotherhood of Teamsters, Changers, Warehousemen and Helpers (the Union), filed a grievance seeking reinstatement and citing provisions in the collective bargaining agreement giving employees the right to refuse to operate unsafe equipment. The Union found little merit in his grievance and refused to process the grievance beyond the early stages of the contractual grievance procedure.

The *Interboro* doctrine, as we understand it, holds that an individual enforcing rights under the labor contract is engaged in concerted activity protected by Section 7 even though he is acting solely for his own purposes since the labor contract itself is the product of concerted activity and the action of the employee is an extension of that process. *Aro, Inc. v. NLRB*, 596 F.2d 713, 716 (6th Cir. 1979); *See NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970); *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enfd.*, 388 F.2d 495 (2d Cir. 1967).

Courts have recognized tension between the *Interboro* doctrine and the plain language of Section 7. *See, e.g., Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert denied*, 450 U.C. 931 (1981); *NLRB v. Northern Metals Co.*, 440 F.2d 881, 884 (3rd, Cir. 1971). Section 7 requires that the employee engage in "concerted activities." An individual does not act in concert with himself. To test whether an action is concerted, we adhere to the criteria set forth by Judge Phillips in *Aro, Inc.*:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

596 F.2d at 718; see *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981).

There is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe, even though the evidence established that there was a bulletin board on which employees informed their co-workers of problems with equipment. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe. While Brown's isolated comment alluded to the safety of all the men, it was not relied on by the Board to evidence concerted action. In view of the vague and general nature of the comment, and the absence of evidence that Brown informed other drivers or his union that number 244 was unsafe, we do not accept the comment as substantial evidence of concertedness. Compare *NLRB v. Lloyd A. Fry Roofing Co.*, *supra*, and *NLRB v. Guernsey-Muskingum Electric Co-operative, Inc.*, 285 F.2d 8 (6th Cir. 1960) with *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011 (6th Cir. 1981); *United Parcel Services v. NLRB*, 654 F.2d 12 (6th Cir. 1981) and *Aro, Inc. v. NLRB*, *supra*.

The union made no effort to protest the use of the truck. Pursuit of Brown's claim that he was discharged in violation of the labor agreement by the Union is to be distinguished from union activities with respect to the equipment Brown believed to be unsafe. The discharge claim asserts a different interest at a later time. It

neither tends to prove nor disprove that when Brown complained he was seeking to represent the Union or other individual employees.

The District of Columbia Circuit relied upon similar facts to those present here in finding that an employee's actions could not reasonably be perceived as concerted in *Kohls v. NLRB*, 629 F.2d at 177. We are in complete agreement with the analysis therein expressed by Judge Edwards as to this issue.

Having found no substantial evidence that the employee's actions were concerted within the meaning of Section 7, we need not address the other arguments raised by the Company.

Accordingly, the Company's petition for review is GRANTED and the Board's cross-petition for enforcement is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1406

CITY DISPOSAL SYSTEMS, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Filed July 22, 1982

JUDGMENT ENTRY

Before: LIVELY and JONES, *Circuit Judges*, and
CECIL, *Senior Circuit Judge*.

On petition for review and cross-application for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of proceedings from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the Company's petition for review is granted and the Board's cross-petition for enforcement is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

/s/ John P. Hehman,

Clerk

ISSUED AS MANDATE: AUGUST 13, 1982

COSTS: Petitioner to recover costs . . . \$460.40

Printing of brief

APPENDIX C
NATIONAL LABOR RELATIONS BOARD
CITY DISPOSAL SYSTEMS, INC. and JAMES BROWN.
Case 7-CA-16792

June 9, 1981

DECISION AND ORDER

On January 15, 1981, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The Board has considered the record and the attached Decision in light of the exceptions and brief¹ and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.⁴

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We agree with the Administrative Law Judge's conclusion that Brown's refusal to drive a vehicle which he honestly believed to be unsafe constituted concerted protected activity. Although the Court of Appeals for the Sixth Circuit disagreed with the Board in similar circumstances in *Aro, Inc. v. N.L.R.B.*, 596 F.2d 713 (1979), denying enforcement to 227 NLRB 243 (1976), we respectfully decline to follow the Sixth Circuit's opinion, and we shall continue to adhere to our decision in that case until such time as the Supreme Court may determine the issue.

⁴ Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, City Disposal Systems, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached order is substituted for that of the Administrative Law Judge.⁵

APPENDIX**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE****NATIONAL LABOR RELATIONS BOARD**

An Agency of the United States Government

WE WILL NOT discharge or otherwise discipline employees for refusing to drive vehicles which they honestly believe to be unsafe to operate, a right afforded them under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in exercising their rights under the National Labor Relations Act.

WE WILL offer James Brown immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and **WE WILL** make him whole for any loss of earnings since his discharge on May 14, 1979, with interest.

CITY DISPOSAL SYSTEMS, INC.

⁵ We have substituted a new notice which contains language conforming to par. 1(a) of the Administrative Law Judge's recommended Order.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed by James Brown, an Individual; the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued the complaint herein on October 19, 1979,¹ alleging that Respondent, City Disposal Systems, Inc., had violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C., § 151, *et seq.*, herein called the Act, by discharging employee James Brown because he exercised his right under Section 7 of the Act² and the collective-bargaining agreement between Respondent and Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to operate a truck which he honestly believed to be unsafe. I heard this case at Detroit, Michigan, on April 11, 16, 17, 1980. Respondent, by its answer to the complaint, denied the commission of the alleged unfair labor practice. For the reasons stated hereafter, I find, in agreement with the General Counsel, that Respondent violated Section 8(a)(1) of the Act, as alleged.

Upon the entire record, and from my observation of the witnesses as they testified, and after consideration of the briefs filed by Respondent and counsel for the General Counsel, I make the following:

¹ Unless otherwise stated, all dates refer to 1979.

² In pertinent part, Sec. 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At all times material to this case, Respondent City Disposal Systems, Inc., a Michigan corporation, with its only office and place of business situated in Detroit, Michigan, has been engaged in the hauling and disposal of waste and rubbish. During the calendar year 1978, Respondent, in the course and conduct of its business operations, enjoyed gross revenues in excess of \$500,000 and provided rubbish removal services valued in excess of \$50,000 for the city of Detroit, which annually purchases goods valued at more than \$100,000, of which goods valued in excess of \$50,000 are shipped to it directly from points outside the State of Michigan. Respondent concedes, and I find from the foregoing data, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

At the time of his discharge on May 14, truckdriver James Brown³ had been in Respondent's employ since

³ Respondent sought to impeach Brown's credibility by introducing evidence of his conviction on April 30, 1970, of the crime of uttering and publishing for which he was sentenced to incarceration for 2½ to 14 years. As this conviction involved dishonesty and occurred less than 10 years prior to this hearing, I received the proffered evidence under Rule 609(a) and (b) of the Rules and Evidence for United States Courts and Magistrates. In light of that conviction and his evasiveness during cross-examination, I find Brown to be an unreliable witness. Accordingly, I credited his material testimony only to the extent it was corroborated in significant respects and by the circumstances generally. *Phillips Industrial Components, Inc., a wholly-owned subsidiary of Phillips Industries, Inc.*, 216 NLRB 885, 889, fn. 8 (1975).

November 3, 1975. Brown's normal assignment was to operate a tractor-trailer combination designated as truck number 245, which he drove between Respondent's Detroit facility and a landfill located at Belleville, Michigan, approximately 37 miles distant, hauling refuse in connection with Respondent's service to the city of Detroit.

The immediate cause of Brown's discharge was his refusal to drive a tractor-trailer combination designated as truck number 244 on May 14. The General Counsel contends that, in refusing to drive truck number 244, Brown was asserting a right which Respondent's collective-bargaining agreement with Local Union No. 247 provided as follows:

ARTICLE XXI

EQUIPMENT, ACCIDENTS AND REPORTS

Section 1. The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

On May 12, as Brown drove truck 245 onto the landfill with his fourth load of refuse, he noticed fellow employee Frank Hamilton driving Respondent's truck 244 immediately behind him. As Brown maneuvered to dump his cargo, he saw that Hamilton was having difficulty stopping his vehicle. To avoid being hit, Brown pulled his truck out of the way.

After Hamilton had stopped, Brown got out of his truck and asked for an explanation. Hamilton explained that when he put his foot on the brake pedal to stop his vehicle, he found his brakes were not working. Hamilton stated that he "almost hit" Brown and then declared "I don't got a sign of brakes on this truck, and

especially here in the landfill pulling up hill like this." Hamilton also said he intended to drive the vehicle "back and get it fixed."⁴

After completing their tasks at the landfill, the two returned to Respondent's Detroit facility, where Hamilton approached Francis Castelono, a mechanic employed by Respondent at its Detroit facility. In the presence of Respondent's mechanic, David Ammerman and driver Brown, Hamilton requested Castelono to check or fix the brakes on truck 244. Castelono responded: "Leave it out the back and we'll get it on the weekend." Ammerman joined, saying, "Yes, we'll take care of it."⁵

On Monday, May 14, Brown reported for work at 4 a.m. He checked the oil, water, and tires on truck 245 and then proceeded to the landfill. Later that morning, Brown had difficulty with truck 245, returned to Respondent's garage, and advised mechanic Ammerman that 245 was defective. I find from Ammerman's testimony that he told Brown: "The garage is full. I've got trucks backed up. I'm not gone be [gonna] able to get to it today. The truck is gonna be down. So you might as well go home or see Otto [Jasmund] and see if there's another truck."

Brown went to the drivers' dispatch room, where he came upon his supervisor, Otto Jasmund. Brown told him that truck 245 was in disrepair and that Ammerman had told him to go home. Brown told Jasmund that "they were supposed to have fixed [245] but it still wasn't fixed." Jasmund responded: "I'll go out and check." Jasmund soon returned and advised Brown that

⁴ My findings of fact regarding the landfill incident are based on Hamilton's and Brown's testimony.

⁵ I have credited Brown's and Hamilton's testimony regarding Hamilton's encounters with Castelono and Ammerman on May 12.

he "might as well punch out and go home because they're not going to do anything for you now." After further discussion, Brown punched out.

However, before Brown could leave, Jasmund asked him to remain and drive 244. Brown answered, "No, there's something wrong with that truck." In the exchange that followed, Brown explained that "something was wrong with the brakes on the truck . . . there was a grease seal or something leaking causing it to be affecting the brakes." At this, Jasmund told Brown to go home. Jasmund's suggestion provoked Brown and an argument ensued between Jasmund and Brown.⁶

Hearing the altercation, a second supervisor, Robert Madary, intervened. Madary asked Brown to take truck 244. Brown declined, stating that the truck "has got problems and I don't want to drive it." Madary persisted, pointing out that half of Respondent's trucks "have problems," and that if Respondent attempted to deal with each of those trucks it would be unable to

⁶ Employee Walter Davis, who at the time of the hearing was in Respondent's employ, testified candidly regarding Brown's confrontation with Jasmund. In contrast, Supervisor Jasmund, who in substance testified that Brown refused to drive truck 244 because it was Hamilton's truck seemed reluctant to testify on cross-examination. This apparent reluctance gave way to unmitigated hostility under cross-examination about the absence of a repair order for truck 244, dated May 12, and the assertion in Respondent's answer to Brown's unfair labor practice charge that the same truck had been repaired and inspected on that date. When thus confronted, Jasmund glared at counsel for the General Counsel and asked, "Who gave you that information?" This outburst persuaded me that Jasmund was more interested in shielding Respondent than in shedding light on the circumstances surrounding Brown's refusal to drive truck 244. Accordingly, I have credited Davis' testimony whenever it conflicted with Jasmund's testimony, except as to the date of the confrontation. On cross-examination, Davis testified that it occurred on May 12. However, the testimony of Brown, Jasmund, and Robert Madary established May 14 as the date of the confrontation.

perform its services. Madary complained, "We've got all this garbage out here to haul and you tell me about you don't want to drive." Brown responded, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Madary scorned Brown's last remark and returned to the supervisor's office.⁷ Following his exchange with Madary, Brown went home.

Later that same day, Local 247's recording secretary, John Calandra, received word that Respondent had discharged Brown. Calandra relayed that information to Brown. That same afternoon, Calandra and Brown went to Respondent's Detroit facility where they met with Supervisors Jasmund and Madary, who refused to

⁷ Madary testified on direct examination that he heard a heated argument between Jasmund and Brown in which, at first, Brown refused to drive truck 245. In the remainder of his version of the Brown-Jasmund encounter, Madary testified that Brown refused to drive truck 244 because driver Hamilton was coming to work.

In rejecting Madary's version and accepting Brown's account of their conversation, I have taken note of the latter's conviction for uttering and publishing. However, there is cause for doubting the reliability of Madary's testimony. Thus, Madary's version of the initial discussion between Jasmund and Brown contradicts Jasmund's corroborated testimony showing that there was no disagreement regarding 245. Further, Madary's testimony contradicts the credited testimony of employee Davis regarding the balance of the exchange between Brown and Jasmund. Unlike Davis who gave his testimony in a full and forthright manner both on cross- and direct examination, Madary's responses during cross-examination were frequently evasive. I also noted that in large part Madary's testimony on direct examination was in response to leading questions. Further, in light of Brown's experience at the landfill on May 12, and given Davis' credited version of Brown's exchange with Jasmund regarding the problem with truck 244, I find it likely that when confronted with a similar request by Madary, Brown responded, as he had previously, that truck 244 had problems with its brakes.

reinstate Brown.⁸ On the following day, Respondent issued a notice to Brown asserting that he had voluntarily quit on May 14. The notice also stated that Brown's misconduct on that date consisted of "Disobeying of orders (refused to drive #244)."

On May 15, Brown filed a grievance against Respondent concerning the previous day's discharge. The current collective-bargaining agreement between Respondent and Local 247 contained provisions for a three-step grievance procedure terminating in reference to a board of arbitration. However, Brown did not receive the benefit of that procedure. The Union found no merit in Brown's grievance and refused to invoke the contractual grievance procedure. Finally, on September 7, Brown filed the unfair labor practice charge which led to the instant proceeding.

B. Analysis and Conclusions

Respondent contends that the complaint herein must be dismissed because Brown did not exhaust his internal union remedies. In support of this contention, Respondent set out in its brief what it represented to be article XIX, section 12(a), (b), (c), and section 13 of the constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, which is entitled "Exhaustion of Remedies."⁹ However, this

⁸ I based my findings regarding Calandra's knowledge of Brown's discharge, Calandra's imparting of that information to Brown, and their subsequent visit to Respondent's facility upon Calandra's testimony and Brown's corroborated testimony.

⁹ The article reads as follows:

EXHAUSTION OF REMEDIES

Section 12 (a). Every member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who

proffered evidence is not part of the record of this case. Accordingly, it lends no support to Respondent's contention.

Even if the quoted language were extracted from the International's constitution those provisions have no application in the instant case. For clearly, they govern only internal union disputes, and not Brown's grievance.

Finally, if Respondent is suggesting that Brown was required to exhaust his remedy under the collective-bargaining agreement's arbitration and grievance procedure, such contention is wholly without merit. Under Section 10(a) of the Act, the power of the Board with

claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof. (b) Where a member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body, before or following exhaustion of all remedies provided for within the International Union, resorts to a court of law and loses his or its cause therein, all costs and expenses incurred by the International Union may be assessed against such individual, Local Union, Joint Council or other subordinate body, in the nature of a fine, subject to all penalties, applicable where fines remain unpaid. Where such court action is by an individual or by a Local Union, Joint Council or other subordinate body against a Local Union, Joint Council or other subordinate body the foregoing provision in respect to the payment of costs and expenses shall be applicable in favor of the Local Union, Joint Council or other subordinate body proceed against in court. (c) The appeals procedure provided herein is also available to and must be followed by any member who is aggrieved by any decision, ruling, opinion or action of the Local Union, membership, officers or Executive Board, excluding collective bargaining matters.

Section 13. All decisions following trials or hearings should be made and rendered within sixty (60) days of the date the hearing or trial commenced, unless otherwise ordered by the General Executive Board. This time requirement shall not be mandatory but is only directory.

respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise" Consistent with the quoted statutory language, "the Board has never shunned jurisdiction merely because a party had the contractual right to go to arbitration but has never exercised the option. [Citations omitted.]" *Aeroder, Inc.*, 149 NLRB 192, 199 (1964). It follows that Brown's failure to seek relief under the arbitration and grievance procedure after the Union had rejected his grievance did not oust the Board from its jurisdiction to process the alleged unfair labor practices in this case.

Respondent's reliance upon *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), all of which involved actions under Section 301 of the Act to compel arbitration under a contract is misplaced. For none of these cases involved attempts to deprive the Board of its authority under Section 10 of the Act. *Aeroder, Inc.*, *supra* at 199.

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by discharging driver James Brown because of his protected concerted activity in refusing to drive truck 244, which Brown believed to be unsafe, and because he attempted to "exercise his contractual right to refuse to operate a vehicle not in safe operating condition." (G.C. br. p.3) Respondent denies the alleged violation, contending instead that Brown's refusal to drive truck 244 was unprotected because the equipment was "in good operating condition" and further that Brown "voluntarily punched out and was given a voluntary quit notice." Contrary to Respondent, I find that Brown was discharged in violation of Section 8(a)(1) of the Act.

At the outset, I reject Respondent's assertion that Brown quit his employment. There is no showing that Brown ever said he was quitting his employment. Instead the record shows that Brown refused to drive truck 244 after he had punched his timecard and then left Respondent's premises. There is no showing that Brown said anything about terminating his employment with Respondent. That same day, shortly after his departure from Respondent's premises, Brown received notification from John Calandra that Respondent had discharged him for refusing to drive truck 244. Calandra also suggested that Brown seek reinstatement to retrieve his job. The same day, Brown, in company with Calandra asked Respondent for reinstatement. Respondent rejected the request. Far from supporting the assertion that Brown voluntarily quit, these facts strongly suggest that Brown wanted his job and that Respondent discharged him on May 14, and I so find.

In *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975), the Board declared:

We have held in the past that when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1). [Footnotes omitted.]

In that case, the Board, found a violation of Section 8(a)(1) after finding that the discharge of a driver "was caused by his refusal to drive what he believed to be an unsafe tractor, and that such refusal was an attempt to compel adherence to the provisions of the contract . . ." *Roadway Express, Inc.*, *supra* at 279-280.

Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the

asserted contract claim or whether the employee expressly referred to the applicable contract in support of his action or was even aware of the existence of the agreement. *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975). The Board does require, however, that the claimed belief be "honestly held." *United Parcel Service*, 241 NLRB 1074 (1979). See also *McLean Trucking Company*, 252 NLRB 728 (1980).

In refusing to operate what he claimed to be an unsafe vehicle, Brown was asserting a right under article XXI of the existing collective-bargaining agreement between Respondent and Local Union No. 247. Further, the assertion of this right was based on Brown's honest belief that the brakes on truck 244 were inadequate. The record shows that truck 244 came to Brown's attention on May 12 while operating truck 245, when he took evasive action to avoid being hit by 244; that driver Frank Hamilton told Brown on that occasion that he was unable to stop truck 244 because it did not have "a sign of brakes"; and, that upon their return to their Detroit facility Brown heard Hamilton complain about truck 244's brakes and request that they be checked. In these circumstances, Brown's complaint 2 days later regarding truck 244's brakes was warranted. Respondent's failure to show Brown that his complaint was unfounded, by either word or demonstration, provided further basis for Brown's claim that truck 244's brakes were unsound.

That another driver subsequently drove truck 244 without incident or that Respondent's record show that truck 244 may have been in good repair are not material to the outcome of this case. For under the principles stated above, I need not decide whether truck 244 was in fact safe at the time of Brown's complaint. I therefore conclude that by discharging Brown for his refusal to operate truck 244, Respondent violated Section 8(a)(1) of the Act. *United Parcel Service, supra* at 1077.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discharging James Brown on May 14, 1979, Respondent has violated Section 8(a)(1) of the Act, and such violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including reinstating and making whole employee James Brown. In order to effectuate the policies of the Act, backpay computation shall be in accordance with the formula in *F.W. Woolworth Company*, 90 NLRB 289 (1950). Payroll and other records in possession of Respondent are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁰

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

¹⁰ See, generally, *Iris Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER¹¹

The respondent, City Disposal Systems, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Discharging or otherwise disciplining its employees because they refuse to drive vehicles which they honestly believe to be unsafe to operate, a right afforded them under the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to James Brown reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole as set forth in The Remedy section, above, for any loss of earnings suffered as a result of his discharge.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order, herein shall as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its facility at Detroit, Michigan, copies of the attached notice marked "Appendix."¹² Copies of said notice on forms provided by the Regional Director for Region 7, shall, after being duly signed by Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."